

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-32361

DAVID A. LUFKIN
a/k/a DAVID A. LUFKIN, ATTORNEY

Debtor

ASSETCARE, INC.

Plaintiff

v.

Adv. Proc. No. 00-3135

DAVID A. LUFKIN

Defendant

**MEMORANDUM ON DEFENDANT'S
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

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RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

Before the court is the Debtor's Motion to Dismiss and/or for Summary Judgment (Motion) filed on December 19, 2000. The Motion seeks dismissal of the Plaintiff's Complaint for Determination of Non-Dischargeability (Complaint) filed November 20, 2000, for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6)¹ and for failure to plead fraud with particularity as required by FED. R. CIV. P. 9(b).² In the alternative, the Motion seeks summary judgment as to Count I of the Complaint. The Motion was accompanied by a Brief in Support of Motion to Dismiss and/or for Summary Judgment.

¹ Rule 12(b), made applicable to this adversary proceeding by FED. R. BANKR. P. 7012(b), states in material part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted[.]

FED. R. CIV. P. 12(b).

² Rule 9(b), made applicable to this adversary proceeding by FED. R. BANKR. P. 7009, states:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b).

The Plaintiff submitted AssetCare's Response to Debtor's Motion to Dismiss and/or for Summary Judgment on January 11, 2001. That same day, the Plaintiff, pursuant to FED. R. CIV. P. 15(a), also filed an Amended Complaint for Determination of Non-Dischargeability (Amended Complaint).³

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Debtor, an attorney, formerly represented the Plaintiff in numerous debt collection matters. However, the parties' relationship soured to the point that the Plaintiff filed a Complaint for Declaratory Judgment on May 17, 1996, in the Chancery Court of Sullivan County, Tennessee. As a result of that litigation, counsel for the parties, by agreement, signed a Judgment

³ Rule 7015 of the Federal Rules of Bankruptcy Procedure directs that Rule 15 of the Federal Rules of Civil Procedure is applicable to adversary proceedings. Rule 15(a) provides in material part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FED. R. CIV. P. 15(a).

Pursuant to Rule 15(a), a party is permitted to amend its pleading once as a matter of course before a responsive pleading is served. The exclusive list of "pleadings" provided by FED. R. CIV. P. 7(a) and FED. R. BANKR. P. 7007 includes:

a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

FED. R. CIV. P. 7(a). Motions to dismiss and motions for summary judgment are not included in Rule 7's definition and therefore are not pleadings. See *id.*; see also *Rogers v. Girard Trust Co.*, 159 F.2d 239, 240 (6th Cir. 1947).

The Debtor has yet to submit any of the "pleadings" enumerated in Rule 7. Accordingly, as no "responsive pleading" has been served, Rule 15(a) allows the Plaintiff to amend its Complaint as a matter of right. The court will therefore consider the Amended Complaint in deciding the issues raised by the Debtor's Motion.

Order on December 7, 1999, granting a judgment of \$165,000.00 plus 10% interest from the date of the Judgment Order to the Plaintiff.

On June 14, 2000, an Involuntary Chapter 7 Petition was filed against the Debtor. The Order for Relief was entered by default on July 13, 2000.⁴ Subsequently, this adversary proceeding was commenced by the November 20, 2000, filing of the Plaintiff's Complaint, which was then supplanted by the Amended Complaint filed on January 11, 2001. By Count I of the Amended Complaint, the Plaintiff asks the court to find its \$165,000.00 judgment a nondischargeable debt pursuant to 11 U.S.C.A. § 523(a)(2)(A),⁵ (a)(4),⁶ and (a)(6).⁷ Count II of the Amended Complaint seeks additional monetary damages from the Debtor.

As previously noted, the Debtor's Motion, which was filed prior to the Amended Complaint, seeks dismissal both for failure to state a claim upon which relief can be granted and for failure to plead fraud with particularity. In the alternative, the Motion seeks summary judgment as to Count I of the Complaint. The court will address each of the Debtor's theories in turn.

⁴ The circumstances leading up to the filing of the Involuntary Petition against Debtor need not be recounted herein. See *In re Lufkin*, 255 B.R. 204 (Bankr. E.D. Tenn. 2000).

⁵ Section 523(a)(2)(A) provides that a discharge in bankruptcy does not discharge a debt "for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]" 11 U.S.C.A. § 523(a)(2)(A).

⁶ Section 523(a)(4) excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]" 11 U.S.C.A. § 523(a)(4).

⁷ The § 523(a)(6) exception provides that debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" are excepted from discharge. 11 U.S.C.A. § 523(a)(6).

II

The Debtor first seeks dismissal pursuant to FED. R. CIV. P. 12(b)(6),⁸ asserting that the Plaintiff has failed to state a claim upon which relief can be granted. In deciding Rule 12(b)(6) motions, courts must “construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.” *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993). While this standard is liberal, it “requires more than the bare assertion of legal conclusions.” *Id.*

In the Amended Complaint, the Plaintiff alleges several fraudulent and willful actions by the Debtor that, if proven at trial, could support a finding of non-dischargeability under 11 U.S.C.A. § 523(a)(2)(A), (a)(4), or (a)(6). Similarly, the Plaintiff has alleged sufficient facts to maintain its cause of action under Count II. Construing the Amended Complaint in the light most favorable to the Plaintiff and accepting all factual allegations as true, it is possible that the Plaintiff will be able to prove facts supporting its claims which will entitle it to the requested relief. The court therefore declines to dismiss the Amended Complaint pursuant to FED. R. CIV. P. 12(b)(6).

⁸ See footnote 1.

III

The Debtor next seeks dismissal under FED. R. CIV. P. 9(b)⁹ for failure to plead fraud with particularity. Allegations of fraud under § 523(a)(2)(A) and (a)(4) of the Bankruptcy Code are governed by Rule 9(b). See *Baltimore Spice Co. v. B.J. Packing, Inc. (In re B.J. Packing, Inc.)*, Nos. 91-3075, 90-33607, 1991 WL 335436, at *3 (Bankr. N.D. Ohio 1991). To satisfy Rule 9(b), a complaint must “at minimum allege the time, place and contents of the misrepresentation(s) upon which [the Plaintiff] relied.” *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984).

The court finds the Amended Complaint sufficiently detailed to satisfy the particularity requirement. The Plaintiff cites the time, place, and content of at least three allegedly fraudulent actions and has attached documentation in support of each. The Amended Complaint further asserts that the Debtor’s failure to submit to examination at his creditors’ meeting has prevented the Plaintiff from discovering additional facts. See *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988) (“Courts have held that [Rule 9(b)] may be relaxed where information is only within the opposing party’s knowledge. Especially in a case in which there has been no discovery, courts have been reluctant to dismiss the action where the facts underlying the claims are within the defendant’s control.”) (internal citations omitted).

⁹ See footnote 2.

Rule 9(b) “requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim.” *Id.* The Amended Complaint meets that requirement. Dismissal under Rule 9(b) would be improper.

IV

Lastly, the Debtor seeks summary judgment as to Count I of the Complaint. Summary judgment is governed by FED. R. CIV. P. 56, which is made applicable to adversary proceedings by FED. R. BANKR. P. 7056. Rule 56 directs in material part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c).

A genuine issue of material fact exists if the evidence could support a reasonable verdict in favor of the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The court’s function at the summary judgment stage is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 2511. The critical analysis is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 2512. The substantive law underlying the action dictates which facts are material for the purposes of summary judgment. *See id.* at 2510.

The Debtor's Motion alleges that the original Complaint failed to assert facts sufficient to support the Plaintiff's non-dischargeability claim. Any deficiencies in that Complaint, however, were rendered moot by the timely filing of the Amended Complaint. In the Amended Complaint, as previously noted, the Plaintiff cites several actions by the Debtor which could support a finding of non-dischargeability. Specifically, the Plaintiff cites instances of misleading statements and improper retention of the Plaintiff's funds. Attached to the Amended Complaint are trial transcripts, court documents, internal memoranda, and other documentation supporting the Plaintiff's allegations of fraudulent and willful injury.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 2513 (citing *Adickes v. S.H. Press & Co.*, 90 S. Ct. 1598, 1608-09 (1970)). In light of the Plaintiff's Amended Complaint, the court is unable to conclude that the evidence is so one-sided that the Debtor should prevail as a matter of law under § 523(a)(2)(A), (a)(4), or (a)(6). The Debtor's Motion will therefore be denied with respect to summary judgment on Count I of the Complaint.

V

One additional issue requires the court's attention. In AssetCare's Response to Debtor's Motion to Dismiss and/or for Summary Judgment, the Plaintiff "reserves the right to further amend its Complaint." The Plaintiff goes on to state that "[t]hrough discovery, AssetCare intends to unearth additional evidence of the Debtor's wrongdoing and will amend its [C]omplaint accordingly."

AssetCare's reservation of the right to amend is ineffective. Rule 15 provides that the Plaintiff may amend its pleading only one time as a matter of right under enumerated conditions. See FED. R. CIV. P. 15(a). All other amendments may occur only by leave of court or with the written consent of the adverse party. See *id.* While leave is to be "freely given when justice so requires," the power to grant such leave rests only within the discretion of the court or upon consent of the adverse party. See *id.*; see also *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986).

VI

The Debtor's Motion to Dismiss and/or for Summary Judgment must be denied in its entirety. An appropriate order will be entered.

FILED: January 23, 2001

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendant

ORDER

For the reasons stated in the Memorandum on Defendant's Motion to Dismiss and/or for Summary Judgment filed this date, the court directs that the Motion to Dismiss and/or for Summary Judgment filed by the Defendant on December 19, 2000, is DENIED.

SO ORDERED.

ENTER: January 23, 2001

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE